IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

L.Rs. of Late Shri Roop Ram & anr.	**vs.**	L.Rs. of late Shri Ganpat Ram.

S.B. Civil Second Appeal No.206/1996 against the judgment and decree dated 3.2.1996 passed by the learned Addl. District Judge, Churu in Civil Appeal No. 62/92.

Date of Judgment: May 15, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. M.R.Mehta for the appellants.
Mr. J.K. Bhaiya and Mr. Narendra Singh for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

This appeal is against the judgment and decree of the first appellate court dated 3.2.1996 by which the appellate court dismissed the appeal of the plaintiffs-appellants preferred against the judgment and decree of the trial court dismissing the plaintiffs' suit no.83/70 filed initially for injunction on 23.4.1966 and amended time to time and ultimately relief of possession was also sought.

Brief facts of the case are that according to the plaintiffs,

they purchased the plot in dispute measuring 4900 sq.yard (small local measurement) by registered sale-deed on 25.3.1966 for a consideration of Rs.7000/-. The copy of the sale-deed is Ex.4. That plot was originally belonging to one family of Kothari, who had *Patta* of the suit property in the names of their ancestors, which was issued in favour of said Kothari family in the Samvat Year 1936. The plaintiffs stated that at the time of purchase of the property, one tin-shed and a hut were there on the land in dispute. The plaintiffs submitted that the defendants want to encroach upon the plaintiffs' purchased land and, therefore, they are entitled to decree for prohibitory injunction against the defendants. The suit was filed on 24.4.1966, i.e. within one month from the date of purchase of the suit property by the plaintiffs. The defendants submitted written statement on 24.8.1966 and stated that they are in possession of the suit property since last 40 years and it was never in possession of the plaintiffs nor it was in possession of the plaintiffs' seller at any point of time. Therefore, there is no question of defendants' dispossessing the plaintiffs because the defendants are already in possession of the suit property. The defendants also submitted a map wherein marked portion ABC which was claimed to be in possession of defendant

Narayani, the marked portion CEFGHIJD was in possession of Bhoor Das and his wife Surji. It is stated that the land which was in possession of Narayani by the time of filing of the suit, was in possession of her father-in-law since last 40 years. Narayani's possession in the said land was from the time of her father-in-law. The defendants also submitted that marked portion CEFGHIJD was purchased by defendant Surji by sale-deed dated 12.1.1933 and for this land, a *Patta* was issued in the Samvat Year 1936.

The plaintiffs on 23.10.1972 amended the plaint and impleaded one Ganpat Ram also as party. On 24.8.1974, the plaintiff further amended the plaint and submitted that defendants nos.1 to 3 constructed a wall in the western side of the property,therefore, a decree for demolition of said wall as well a decree for demolition of hut which was constructed by the defendants, may also be passed against the defendants. The plaintiffs also claimed money decree of Rs.200/- on the ground that the defendants utilized plaintiffs' stones in constructing the wall.

The defendants submitted amended written statement on 3.9.1974 and submitted that the defendants never constructed any new wall nor used plaintiffs' any stone. The plaintiffs further

amended the plaint on 9.11.1974. The defendants Bhoor Das and Surji died and their legal representatives were taken on record.

Ganpat Lal was added subsequently as party defendant then he submitted written statement on 6.9.78 and again asserted that the plaintiffs were never in possession of the suit property, rather the land in dispute was in possession of the defendants since last more than 40 to 50 years. Therefore, they became owner of the property.

The plaintiffs' suit was initially decreed by the trial court and the appeal was preferred by the plaintiff in which the appellate court allowed the appeal of the plaintiffs and the appellate court remanded the matter to the trial court vide order dated 31.3.1986. The appellate court permitted the plaintiffs to produce and prove the Patta of the land in dispute and, therefore, the appellate court remanded the matter to the trial court for deciding the suit afresh after evidence of the parties on the new evidence in the form of Patta. The matter came up before this Court as the order of the first appellate court dated 31.3.1986 was challenged and this Court modified the order of the first appellate court and set aside the order of remand and instead of remand, remitted the matter to the trial court for taking evidence on the Patta. The trial court,

therefore, recorded evidence of the parties and returned the recored to the first appellate court. The first appellate court vide judgment and decree dated 3.2.1996 dismissed the appeal of the plaintiffs after upholding the finding recorded by the trial court. Hence this second appeal.

Following substantial questions of law were framed by this Court while admitting this appeal on 14.7.1997:-

> "*(1) Whether the appointment of second commissioner automatically resulted in setting aside the appointment of first commissioner and his report therefore both the courts below have committed substantial error of law on placing reliance on the report of first commissioner within the meaning of sub-rule (3) of rule 10 of Order 26,C.P.C.?*
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> (2) Whether if a finding of fact is based on admissible as well as inadmissible evidence then it is difficult for this court to adjudicate as to how much the mind of learned courts below was influenced by inadmissible evidence hence such finding of fact has no binding effect in second appeal ?"

The learned counsel for the appellants vehemently submitted that the plaintiffs proved the Patta of the land in dispute and also proved the registered sale-deed dated 25.3.1966 by which the plaintiffs purchased the suit property. The plaintiffs produced the

seller in evidence, who is PW-16 Rawat Mal, one of the sellers, who clearly stated that the sellers were in possession of the suit property and they are owners of the property by virtue of Patta issued in their ancestors favour in the Samvat Year 1936. The plaintiffs also produced one of the plaintiff's son Ganpat Ram (PW-13), who was not only power of attorney of the plaintiff but had full knowledge of all the facts of the case and, therefore, was competent witness to give evidence in the present suit. The plaintiff's witness PW-13 Ganpat Ram proved the possession of the plaintiffs. The plaintiffs in total produced 16 witnesses. According to the learned counsel for the appellants, all those documents, like the Patta of the land in dispute, the registered sale-deed dated 25.3.1966 as well as the document Ex.8, the report of the Tehsil, whereby the plaintiffs' possession fully proved, were discarded by both the courts below by considering inadmissible evidence and that was the commissioner's report dated 4.9.1966. This commissioner's report dated 4.9.1966 was considered by both the courts below despite the fact that the trial court on application of the plaintiffs, by order dated 12.1.1967, held that the first commissioner's report was prepared without the help of *Gajdhar* and that was in violation to the court's order dated 3.8.1966

because the trial court in its order appointing the commissioner, directed the commissioner to take help of the expert *Gajdhar*. The trial court, again by order dated 12.1.1967 appointed another site inspection commissioner and further directed the commissioner to take help of the approved *Gajadhar* while inspecting the site. The two courts below ignoring the order dated 12.1.1967, took into account the commissioner's report as well as map prepared by the commissioner, not in pursuance of the order dated 12.1.1967, but considered the earlier commissioner's report. Therefore, the judgment and decree of the trial court deserves to be dismissed only on this ground.

The learned counsel for the appellant-plaintiffs vehemently submitted that the defendants did not claim adverse possession which is clear from the written statement itself. It is also submitted that the defendants failed to prove their title to the property. The defendants also failed to prove their possession of the property. It is submitted that the Patta and the registered documents should not have been ignored by the two courts below. It is also submitted that when title was of the sellers since Samvat Year 1936 and it was devolved upon the plaintiffs then the presumption of the possession should have been drawn in favour of

the plaintiffs. The learned counsel for the appellants also referred the statements of the witnesses, particularly PW-13 and PW-16 and also pointed out the facts mentioned in the sale-deed dated 25.3.1966 by which the plaintiffs purchased the suit property. The learned counsel for the appellants also read the copy of the commissioner's report Ex.3, which according to the appellants, should have been considered by both the courts below instead of earlier commissioner's report. According to the learned counsel for the appellants, in the commissioner's report Ex.3, it is clearly mentioned that one of the hut constructed on the spot was new one and the plaintiffs' case is also that defendants constructed the wall and the hut after filing of the suit by the plaintiffs. Therefore, such act of the defendants cannot amounts to actual physical possession of the defendants.

The learned counsel for the respondents-defendants submitted that the plaintiffs miserably failed to prove that in fact the possession of the suit property was handed over to the plaintiffs by the sellers. The defendants also submitted that the property was never in possession of the vendors before the sale-deed dated 25.3.1966 was got executed. It is also submitted that in fact the said vendors when failed in ousting the defendants,

created document of sale in favour of plaintiffs and within one month, the plaintiffs filed present suit. The learned counsel for the respondents submitted that the two courts below concurrently decided the question of facts in favour of the defendants which are proved from the evidence, therefore, this Court may not interfere in the second appeal under Section 100 C.P.C.

The learned counsel for the defendant-respondents submitted that the defendants not only denied the allegations of the plaintiffs as alleged in the plaint but very specifically gave full description of the property by submitting a detail map with full demarcation showing the possession of each of the defendants. The plaintiffs failed to produce any evidence to prove their possession over the property nor the plaintiffs' predecessor could produce any evidence about their possession over the suit property. The learned counsel for the respondents submitted that even if first commissioner's report is ignored and second commissioner's report is considered even then by that time only possession of the defendants is proved. It is also submitted that even if both the commissioner's reports are ignored then also, there is no evidence on record to prove the possession of the plaintiffs. It is submitted that from the evidence of the defendants, the possession of the

defendants is proved and more is that the plaintiffs themselves subsequently to the filing of the suit, admitted possession of the defendant, then it was for the plaintiffs to prove that the defendants took over possession of the property during pendency of the suit. Unless that is proved, presumption of possession of the defendants can be drawn back ward also.

I considered the submissions of the learned counsel for the parties and perused the record.

It is true that the two courts below committed serious error of law by considering the commissioner's report dated 4.9.1966 in view of the trial court's order dated 12.1.1967, by which the trial court clearly held that the first commissioner did not comply with the direction of the court and did not prepare the factual report of the spot with the help of approved *Gajadhar*. Therefore, the trial court appointed second commissioner and second commissioner submitted report with detail map. At this juncture it will be worthwhile to mention here that the two courts below were of the view that in fact map was with the first commissioner's report. Be it as it may be. The question with respect to the second commissioner's report is not in dispute. In the second commissioner's report, the commissioner very specifically

mentioned that in the map at No.1 and No.2, the possession of Narayani Devi, Suraj Devi and Bhoor Das respectively was there and it was enclosed by fencing. The commissioner very specifically stated that Narayani, Surji and Bhoor Das are in possession of the said piece of land and that is the land in dispute. In the commissioner's report there is mention of some small structure as well as wall and other hut. For one of the hut, which is facing towards eastern side, was found to be old one. The commissioner also observed that there is a shed on the plot in dispute and one more hut and they appear to be new one. In the commissioner's report, it is nowhere stated that the plaintiffs were in possession of the suit property even as on 12.1.1967. In the commissioner's report it is mentioned that some of the structures were old and some are new one. So far as old structures are concerned, there is no explanation of the plaintiffs. The plaintiffs in their plaint stated that at the time of purchase of the property, there was one tin shed and one hut on the land in dispute but that fact is not supported by the sale-deed Ex.4. Be it as it may be, the commissioner's report alone was not the basis for the decision given by the two courts below about the plaintiffs possession.

The plaintiffs' own witness, the seller PW-16 Rawat Mal in his

evidence, stated that he as well as other co-sharers executed the sale-deed in favour of the plaintiffs but he clearly admitted that he himself did not deliver the possession of the suit property to the plaintiffs. He stated that one Chand Mal was present when possession of the property was delivered to plaintiffs but he was not produced. Contrary to it, the plaintiffs themselves did not give their evidence and produced PW-13 Ganpat Lal, son of one of the plaintiff Roopa Ram, who stated that at the time of taking possession, all the vendors were there along with other persons, then plaintiff"s sons statement stands contradicted by the seller himself. The plaintiff's son Ganpat Lal nowhere stated that at the time of purchase of the property, any hut or shed was on the land in dispute. It is the only evidence of the plaintiffs that one of the vendors was in possession of the property and at the time of sale of the property, the land in dispute was open piece of land. It is true that by virtue of title, a presumption can be drawn about the possession of the property with the tittle holder but that presumption is rebuttal. The plaintiff first failed to prove that in fact on the date when they purchased the property on 15.3.1966, vendors were in possession of the property and they delivered the possession of the property to the plaintiffs. The plaintiffs'

witnesses, though may be in number 16, but all witnesses are not worth reliance and, therefore, were rightly not believed by the courts below and for which the reasons have been given by the first appellate court, which I need not to repeat. The reasons given by the courts below for holding the issue against plaintiffs' possession is definitely based upon the correct appreciation of evidence.

In view of the above reasons, it is held that in the present case, the first commissioner's report could not have been taken into account when the trial court itself by specific order mentioned the reason for not accepting the first report and appointed second commissioner and thereby, the first commissioner's report stands excluded and the question no.1 is answered accordingly.

The appellate court has jurisdiction to look into the evidence for the purpose of finding out whether there was sufficient reason for deciding issue and whether the courts below has decided the issue of fact by taking into account inadmissible evidence. In the present facts of the case, it cannot be said that the two courts below have based their finding of fact about the defendants possession and the plaintiffs having no possession on the basis of any inadmissible evidence only.

In view of the above reasons, I do not find any merit in this appeal and the appeal of the appellant is dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.